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IN THE  
Supreme Court of the United States

OCTOBER TERM—1943

No. 792

EDWARD D. LOUGHMAN, as Receiver of The Pelham National  
Bank, Pelham, New York,

*Plaintiff,*

*against*

~~TOWN OF PELHAM~~, Westchester County, New York,  
*Petitioner and Third-Party Plaintiff,*

*against*

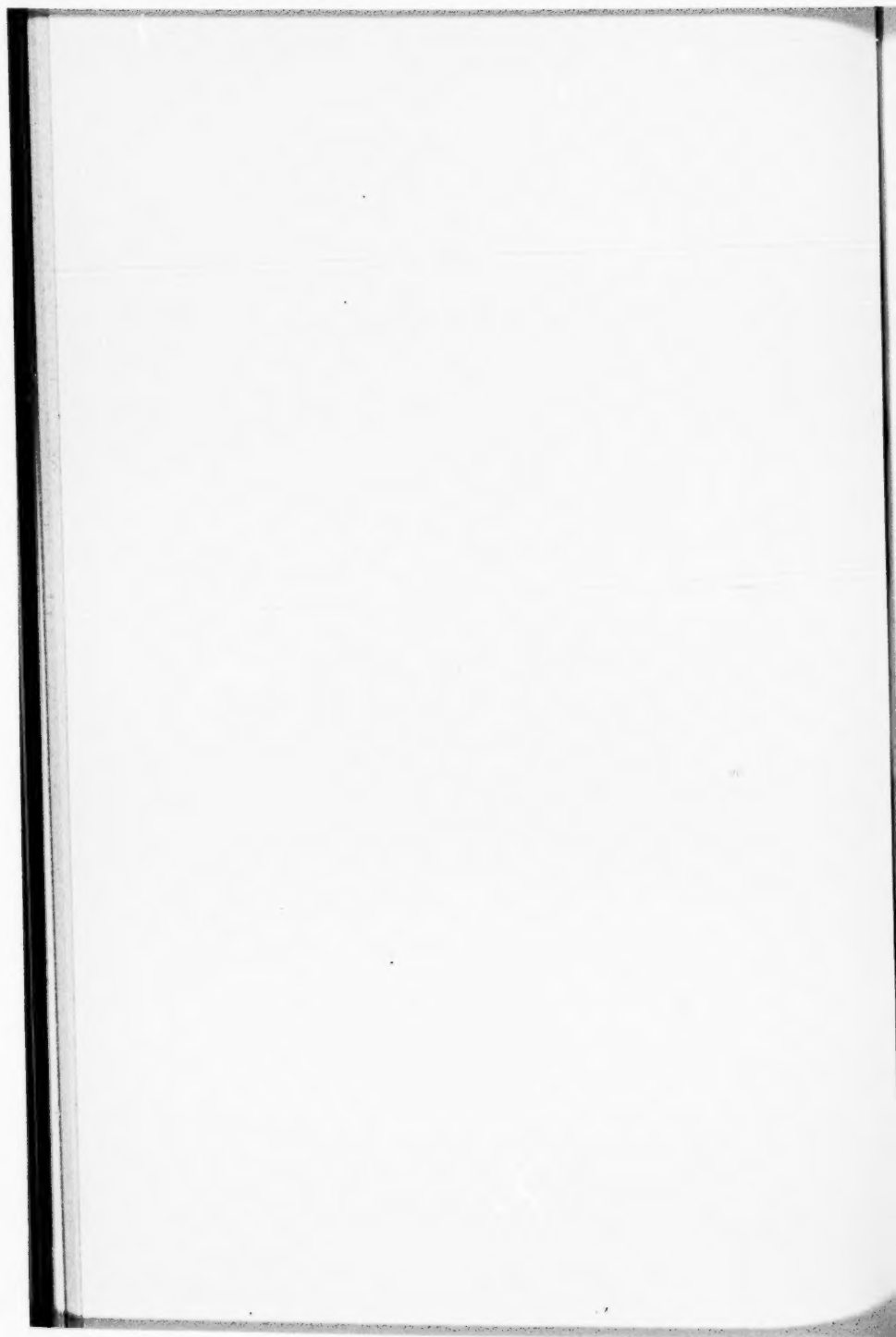
THE EMPLOYERS' LIABILITY ASSURANCE  
CORPORATION, LTD.,  
*Respondent and Third-Party Defendant.*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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March 14, 1944



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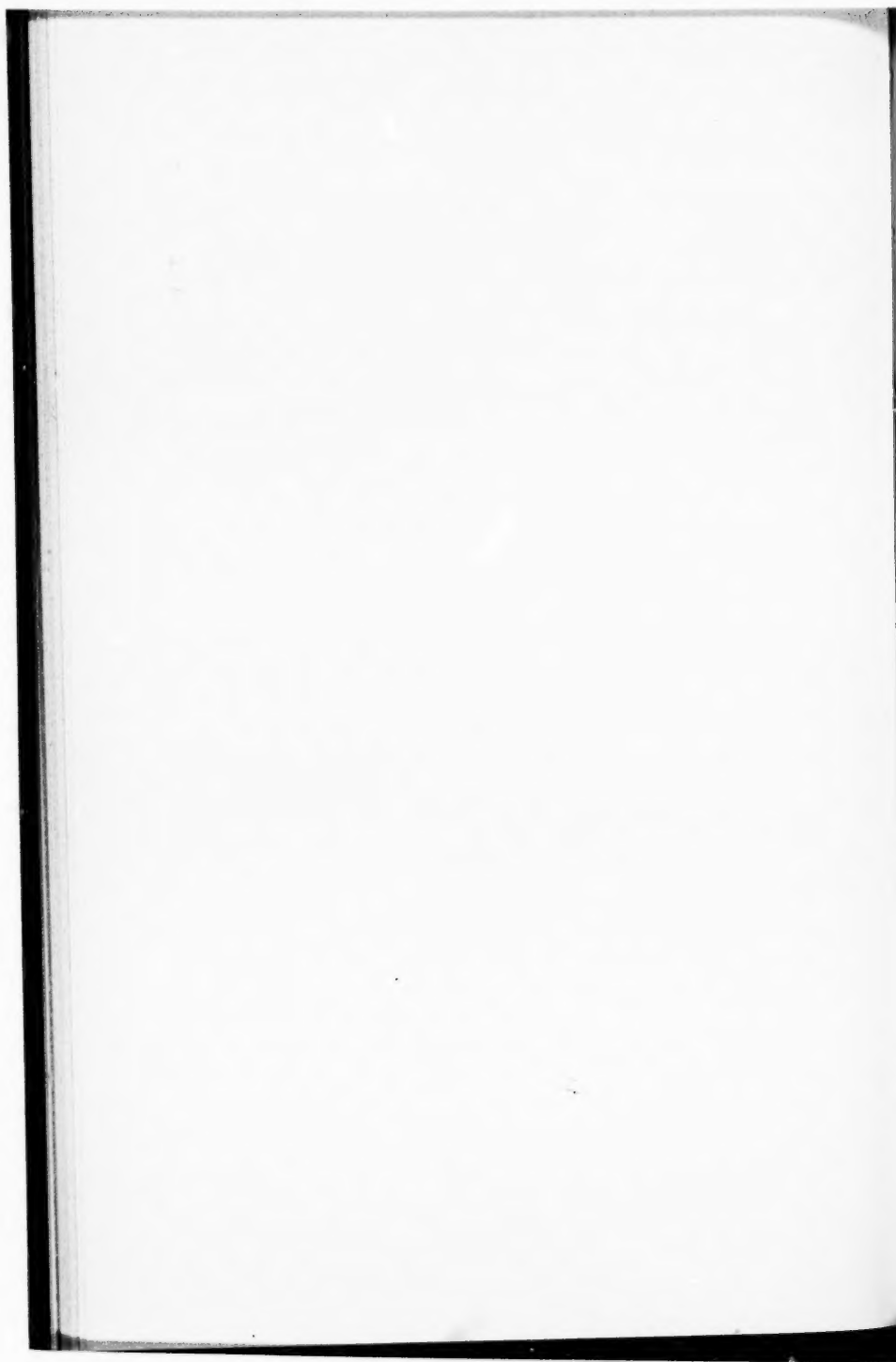
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**No. . . . .**

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EDWARD D. LOUGHMAN, as Receiver of The Pelham National  
Bank, Pelham, New York,

*Plaintiff,*

*against*

TOWN OF PELHAM, Westchester County, New York,  
*Petitioner and Third-Party Plaintiff,*

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THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.,  
*Respondent and Third-Party Defendant.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner Town of Pelham respectfully prays that a writ of certiorari issue to review the Order of the United States Circuit Court of Appeals for the Second Circuit entered December 16, 1943 (R. 7-63 ). This affirmed the judgment of the United States District Court for the Southern District of New York entered March 1, 1943 (R.

NOTE: All references to the record before the Court below are in *folio* numbers. Because of the unavailability, at the time of completing this petition and brief, of folio numbers on the added pages containing the Opinions below and the further proceedings, references to those matters are necessarily in *page* numbers in that part of the record and have been written in.

13), which dismissed the third-party complaint of the Town of Pelham against The Employers' Liability Assurance Corporation, Ltd. The Receiver is not involved in the present litigation.

The majority and dissenting Opinions below are at R. P. 54, and are reported in 139 Fed. (2nd) 989. The Opinion of the District Court is at R. 121.

#### **A. Summary Statement of the Matters Involved**

Principal facts giving rise to present questions are in the statement (R. P. 52 ) preceding the Opinions below.

The action is upon the official bond of one Joseph H. McCormick as Supervisor of the Town of Pelham, in Westchester County, New York State. Town funds received by the Supervisor were admittedly lost.

At the time the Supervisor took office, the Town Law of New York required, as it had for many years (L. 1909, Ch. 63, Sec. 100), that the Supervisor give an official undertaking, with sufficient surety, that he would "well and faithfully discharge his official duties" and would "well and truly keep, pay over and account for all moneys and property" belonging to the Town and "coming into his hands as such Supervisor". The defendant Surety Company executed McCormick's undertaking as surety (R. 34, 40, 73, 75). The condition was that McCormick

"shall pay over and account for all funds coming into his hands from January 1st, 1932 to December 31st, 1932, by virtue of his said office of Supervisor and shall well and faithfully perform all the duties of his said office"

only in which event McCormick and the Surety Company were to be released from liability to the Town for its funds (R. 34). The bond first given was extended, and covered the period within which Town funds were lost (R. 40).

The settled law and public policy of the State of New York, it will hardly be disputed and will be shown in our brief, had long been and then were that the Supervisor as the Town's chief fiscal officer was absolutely liable for Town funds, in the absence of clear and specific legislative provision relieving him from such liability upon his compliance with a statutory method of protecting the Town against loss of its funds.

At the time McCormick took office as Supervisor, the Legislature had not, we submit, relieved him from liability, but had provided a method by which he and his surety could protect and reimburse themselves in the event of the loss of Town funds. The Town Law at that time provided, as it had for many years (L. 1909, Ch. 63, § 101), that the Supervisor of a Town might, at the Town's expense,

“purchase a surety bond of some solvent surety company, authorized to do business in the State of New York, securing to such Supervisor the safety of Town funds deposited by him in any bank or banking institution in this State, and indemnifying him against the loss thereof through the failure or insolvency of such bank or banking institution”.

McCormick and his surety did not avail themselves of this statutory method for their protection.

Instead of doing what the Legislature had authorized him to do for his protection against his outright liability, McCormick, at the request of the Surety Company as a condition of its execution of his undertaking (R. 73), entered into an Escrow Agreement dated December 28, 1931, with The Pelham National Bank and the Mount Vernon Trust Company, whereby the Pelham Bank, as a condition of and to induce the Supervisor's depositing the Town's funds in that Bank, and for the particular purpose of indemnifying the Supervisor in the event of any loss of deposited funds, pledged in escrow with the Trust Company

\$25,000 principal amount of Westchester County 4¼% Bonds due in 1968 (R. 79). This course of action by McCormick and the Surety Company gave rise, when the Pelham Bank became insolvent, to the Receiver's suit against the Town for the total proceeds of the escrow bonds and additional payments to the Town. In that litigation the Town prevailed as to retaining the proceeds of the escrow bonds (126 Fed. (2nd) 714).

The Town Board, on the motion of McCormick as its chief fiscal officer, had designated two banks and one trust company, all selected by him, "as depositaries for funds of the Town" (R. 72). He then chose to put and keep the Town funds in two of the three designated depositaries, and made no deposits at all in one of them (fol. 74). He chose to make the Pelham Bank his principal depository, and kept Town funds there in a greater amount (fol. 64) than either the par value or the market value of the bonds (fol. 65) which he and the Surety Company had required to be deposited in escrow to protect them against their liability for the loss of Town funds. When the Pelham Bank closed its doors in 1933, never to reopen, McCormick had \$27,862.92 of Town funds in that Bank (fol. 64).

This inadequacy of the escrow bonds fully to make good the amount of Town funds which McCormick had chosen to have in the Bank at the time it closed and failed gave rise to the present claim against the Surety Company, which has conceded that it is liable if the Supervisor was liable.

#### **B. The Opinions Below**

The majority in the Court below (R. ¶ 54 ) recognized the New York rule of the outright liability of a Supervisor "for the net loss resulting from the Bank's failure", and would have enforced it, "were it not for § 149-c" of the Town Law. That provision was a part of a 1916

budgetary plan for certain Towns (L. 1916, Ch. 396), made applicable to the Town of Pelham in 1931 (L. 1931, Ch. 92).

This legislation contained no provision which, in terms or otherwise, even purported to relieve a Supervisor from liability for Town funds, nor did it repeal the provisions of Sections 100 and 101 of the Town Law above quoted. It even contained a "saving clause" negating repeal and prohibiting any construction having the effect of repeal. The provisions, in pertinent part, were as follows:

"§ 149-c. *Duties of Supervisor.* The Supervisor of any such Town shall demand, collect, receive and have the care and custody of and shall disburse all moneys belonging to or due the Town from every source, except as otherwise provided by law. All moneys of the Town received by the Supervisor shall be deposited by him in such bank, banks or trust companies as shall be designated by the Town Board for such purpose. \* \* \*"

"§ 149-e. *Saving clause.* Nothing contained in this article \* \* \* shall be construed to repeal any statute of the State or lawful resolution of the board of supervisors of the County in which the Town is situated, or of the Town Board, or rule or regulation of the board of health of the Town, not inconsistent with the provisions of this article, and the same shall remain in full force and effect, when not inconsistent with the provisions of this article, to be construed and operated in harmony with its provisions."

With all deference, we submit that the dissenting opinion of Judge Swan more soundly construed and applied the local law designed for the protection of Towns from the loss of the funds raised by taxation. He adhered to the rule of absolute liability in the absence of express exemption based on an authorized method of full protection for the Town—the rule which the Court of Appeals enunciated in 1896 and has ever since applied without exception, and concerning which the Court of Appeals, in its latest decision on the

subject (1938), admonished that the rule was "too well established to be changed by the Courts" (*Bird v. McGoldrick*, 277 N. Y. 492, at page 499).

Judge Swan was of the opinion that the "principle of absolute liability has had so long a legislative recognition and has become so firmly entrenched in the case law of New York that I believe an express legislative mandate is required to get rid of it" (R. P. 62 ). He was unable to accept the view of the majority that the 1916 budgetary plan for Towns, made applicable to the Town of Pelham in 1931, warranted giving to Section 149-c, when taken in connection with Section 149-e, the effect of impliedly relieving the Supervisor of his liability for the loss of Town funds which he put and kept in one of the depositaries designated by the Town Board. He saw "no necessary inconsistency between requiring an official to deposit funds in a bank designated by other officers and requiring him to account if the deposited funds are lost", especially when the harshness of the rule of strict or absolute liability was expressly alleviated by a statute (Section 101) allowing the Town Supervisor to protect himself by obtaining a surety bond at the Town's expense (R. P. 62 ). Moreover, Judge Swan thought it "not without significance that when the new Town Law, effective in 1934, was enacted, the Legislature not only expressly relieved the Supervisor from absolute liability, but at the same time required him to procure a bond or take other security to protect the Town against loss resulting from a failure of a bank in which Town funds were on deposit" (R. P. 62 ). When the Legislature intended to relieve the Supervisor from his historic liability, this was stated expressly, and was coupled with a provision assuring full protection for the Town. Judge Swan declined to construe the 1934 legislation as merely confirming or codifying an exemption which had previously been made (in 1931) without words which even remotely implied an intent to exempt and were coupled with no provision assuring the protection of the Town in the

event of the loss of its funds through the failure of the depositary in which the Supervisor had seen fit to put and leave them.

### **C. Questions Presented**

If this petition for review is granted, the primary question will be as to whether or not, under the statutes and decisional law of the State of New York at the time the Supervisor's undertaking was given and funds of the Town were lost, the Legislature of the State had abrogated the New York rule of a Supervisor's absolute liability to account for and pay over all monies coming into his hands as Supervisor, and had provided a substitute method which it intended should relieve the Supervisor but protect the Town; also, as to whether or not this Supervisor, the defendant Surety Company, and the Town, acted at that time on that basis and within the authority of such method, if any had been prescribed.

If this primary question is determined in the Town's favor, a further question in the litigation, not passed on by the Court below in view of its ruling on the primary question, will be as to whether or not the Surety Company is liable to the Town, as part of its surety obligation, also for the costs and expenses necessarily incurred by the Town in connection with this litigation to protect itself and its taxpayers against the loss of its funds.

### **D. Reasons Relied On for Allowance of the Writ**

1. The Circuit Court of Appeals has decided an important question of local law in a way to be deemed in conflict with applicable local decisions, viz., those of the Court of Appeals of the State of New York. As Judge Swan's opinion below shows clearly, the rule of the public officer's strict and absolute liability to pay over and account for all public funds coming into his hands by virtue of his office, has long had legislative recognition and has become

firmly entrenched in the law of New York; and no authoritative New York case has ever recognized any exception to this rule of strict liability except that of loss due to an act of God or the public enemy. As to Town Supervisors in particular, having in mind the nature of local government outside of cities, it has long been the rule that Supervisors are absolutely liable for the funds they receive, unless and until the Legislature expressly exempts them upon their compliance with a prescribed method assuring the Town against loss. If the majority decision below were permitted to stand, it would set an objectionable and weakening precedent which is directly at variance with the public policy of the State and with numerous prior decisions by the New York Court of Appeals which have reiterated and enforced the liability of public officers receiving public funds.

2. The decision below has the effect of nullifying the express legislative policy and provisions of the New York Town Law which were designed to assure the safety, in any and all events, of the funds of local units of government such as Towns. Any doubt as to this effect of the decision below in this regard would be dispelled by examining the table of statutes in the Appendix hereto. Under the provisions of the New York Town Law in force when Supervisor McCormick took office and the loss took place, the Supervisor and the sureties on his official undertaking were absolutely liable to the Town for any loss of Town funds, even a loss resulting from bank failure; but the Supervisor, in recognition of this latter liability, was authorized to purchase, at the Town's expense, a surety bond "*securing to such Supervisor the safety of Town funds deposited by him in any bank or banking institution in this State, and indemnifying him against the loss thereof*". When the New York Town Law was subsequently amended (1934), the Supervisor and the sureties on his official undertaking were expressly relieved from liability for the loss of Town funds through bank failure; but the Super-

visor was required to purchase, at the Town's expense, a surety bond "*securing to the Town the safety of Town funds deposited by him in or with any bank or trust company in this State, and indemnifying the Town against the loss thereof*". At all times, the clear legislative intent and plan were that the Town funds should be secured from loss in any and all events. By its decision, the Circuit Court of Appeals has defeated the legislative plan and the basic law and policy, and has permitted the loss of the Town funds resulting from the failure of the Pelham Bank to fall upon the Town and its taxpayers, instead of upon the Town Supervisor and the surety on the official undertaking which the Surety Company executed and gave.

3. The decision of the majority in the Circuit Court of Appeals destroys vested contract rights and impairs the obligation of contract. Although professing otherwise, the majority gave essentially a *retroactive* effect to the later amendments to the New York Town Law, and did what the New York State Legislature did not do, and clearly did not intend to do, until some time after the rights of the Town against its Supervisor and his surety had become fixed. Actually, the majority Opinion imports into the explicit terms of the Supervisor's official undertaking a qualification which the Legislature, in amending the Town Law, made effective only upon the procurement by the Town Supervisor, at the Town's expense, of a surety bond *indemnifying the Town* against any loss of its funds when deposited in banks. No such bond was procured by the Supervisor in the instant case; on the contrary, McCormick, acting on his own initiative, for his own benefit, and at the request of the Surety Company, merely entered into a pledge agreement with the Pelham Bank, later held to be *ultra vires* and invalid. The only purpose of this pledge agreement was to indemnify the Supervisor against loss in the event of the failure or insolvency of the Pelham Bank; and the escrow agreement was obviously made with

reference to the express condition of Supervisor McCormick's official undertaking to "pay over and account for all funds coming into his hands" as Supervisor. McCormick, the Surety Company, and the Town, each knew and recognized the nature and extent of the obligation of McCormick's official undertaking, which contained no such qualification of obligation as the majority Opinion below now reads into the terms thereof; and the Surety Company should accordingly be held liable to the Town for the present loss pursuant to the express terms of its surety contract.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case numbered on its Docket No. 18765, and entitled as above shown; and that the Order of that Court entered December 16, 1943, be reversed; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

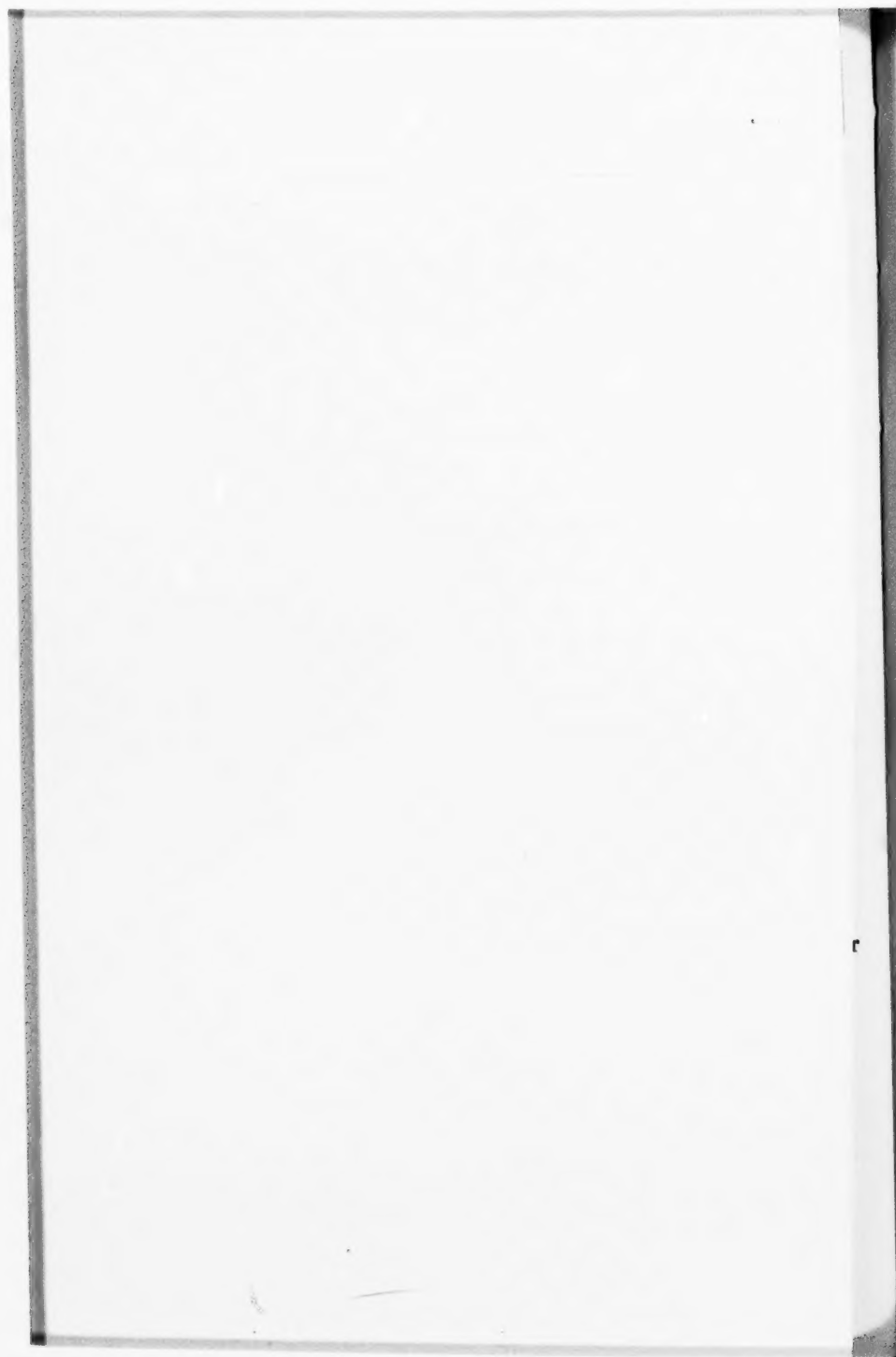
Dated: New York,  
March 14, 1944

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## **BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

The majority and dissenting opinions below are at R. P. 54, and are reported in 139 Fed. (2nd) 989. The opinion of the District Court has not been officially reported, and is at R. 121.

### **Jurisdiction**

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. §347(a)]. The Order of the Circuit Court of Appeals for the Second Circuit, affirming the judgment of the District Court, was entered December 16, 1943 (R. P. 63).

### **Statutes Involved**

The statutes involved are the New York Town Law (L. 1909, Ch. 63, as amended; L. 1932, Ch. 634, as amended) and the New York Public Officers Law (L. 1909, Ch. 51, as amended). The pertinent parts of these statutes and subsequent amendments thereto, are set forth in a comparative form in the Appendix.

### **Specifications of Errors to be Urged**

(1) The Circuit Court of Appeals erroneously decided that the Town Board's designation of The Pelham National Bank as one of the three depositaries, in any or all of which the Supervisor might choose to put and keep the Town funds received by him, modified the absolute and continuing liability of the Town Supervisor to pay over and account for all funds coming into his hands as Supervisor, and that such action relieved the Town Supervisor and the surety on his official undertaking of all liability and responsibility for the loss of Town funds resulting from the failure and insolvency of The Pelham National Bank.

(2) The Circuit Court of Appeals erroneously decided that the Town is not entitled to recover from the Surety Company, as surety on the official undertaking of the Town Supervisor, for the loss of the Town funds resulting from the failure and insolvency of The Pelham National Bank.

(3) The Circuit Court of Appeals erroneously decided that the Surety Company, as the surety on the official undertaking of the Town Supervisor, is not liable to the Town, according to the terms of the bond and the statute, for all of the Town's costs and expenses resulting from the failure of the Town Supervisor to pay over and account for all funds coming into his hands as Supervisor, including litigation costs and other legal expenses of the Town.

## ARGUMENT

### I

**The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with the applicable local decisions of the highest Court of law of the State**

That the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions as well as the basic policy of the State of New York, is apparent from the Opinion of Judge Swan below (R. 760). It long has been, and still is, the settled law of New York that its public officers are liable absolutely to account for and pay over all of the funds which come into their hands by virtue of their office. The sole exceptions are losses occasioned by acts of God or public enemies, or situations where the Legislature has *expressly* relieved the public officer from liability and provided another method for assuring against loss of public funds.

The amount of money here involved may not be large, in comparison with the sums sometimes in the public mind; but the amount here involved is important for this small Town, its taxpayers, and its small amount of Town funds; and the whittling away of a historic concept of the liability of a public officer is important to all units of local government.

In the latest expression of the New York State Court of Appeals on the subject, *Bird v. McGoldrick*, 277 N. Y. 492, Chief Judge Lehman specifically admonished that the Courts should not abrogate or limit the State's rule of absolute liability, saying (page 499):

"Changing judicial views of public policy are an insecure basis for the extension or limitation of established rules of liability or for the rejection of a common law rule of liability and the formulation of a new rule. The judicial rule of liability, without fault, for the loss of public funds received by an officer, even if unduly harsh, is too well established to be changed by the Courts. It is for the Legislature, not the Courts, to change or limit the rule if such change seems wise. \* \* \*"

The majority in the Court below disregarded, in the instant case, the statutory and decisional law of the State that such public officers are in effect insurers of public funds collected from taxpayers and intended for public uses. Such public officers and the sureties upon their bonds and undertakings are liable, without regard to their personal fault, for the loss of such funds. Only at their own risk and peril may they fail to take such steps as they are authorized to take for their own protection and that of the taxpayers. *Unless explicitly relieved by statute*, their liability for the funds received by virtue of their office is and remains absolute, outright, and admits of no excuse. Leading cases, significant because of the span of years which they cover, include:

- Tillinghast v. Merrill*, 151 N. Y. 135 (1896)—Supervisor of Town of Madison—Bank failure;  
*Yawger v. American Surety Co.*, 212 N. Y. 292 (1914)—Supervisor of Town in Illinois under similar statute—Bank failure;  
*Village of Bath v. McBride*, 219 N. Y. 92 (1916)—Village Treasurer—Bank failure;  
*Bird v. McGoldrick*, 277 N. Y. 492 (1938)—Clerk of Municipal Court—liable for defalcations of subordinate appointed by others but in charge of funds;  
*Stanelevitz v. City of New York*, 15 N. Y. Supp. (2d) 837 (1939)—Chamberlain of City of New York—liable for acts of subordinates appointed by others but in charge of funds.

In the oft-cited case of *Tillinghast v. Merrill*, *supra*, the New York Court of Appeals, *per* Bartlett, J., stated the reason and basis for the State's rule of strict liability (151 N. Y. at page 142):

"In the case of an officer disbursing the public moneys much may be said in favor of limiting his liability where he acts in good faith and without negligence, and a strong argument can be framed against the great injustice of compelling him to respond for money stolen or lost while he is in the exercise of the highest degree of care and engaged in the conscientious discharge of duty. When considering this side of the case it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law which exacted proof of misconduct or neglect.

"It is at this point, however, that the question of public policy presents, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents.

“Without regard to decisions outside of our own jurisdiction, we think the weight of the argument, treating this as an original question, is in favor of the rule of strict liability which requires a public official to assume all risks of loss and imposes upon him the duty to account as a debtor for the funds in his custody.”

In *Yawger v. American Surety Co.*, *supra*, Judge Cardozo, writing for an unanimous Court, stated the New York law as to a Supervisor in the following explicit terms (212 N. Y. at page 297) :

“It is important to bear in mind the nature of a public officer’s liability for public moneys received by virtue of his office. His liability does not grow out of negligence. *It is absolute, admitting of no excuse*, except perhaps the act of God or the public enemy. (*Tillinghast v. Merrill*, 151 N. Y. 135, 142; *Smythe v. U. S.*, 188 U. S. 156.) If he puts the money in a safe and burglars break open the safe and steal the money, he is liable. *If he puts it in a bank, and the bank loses it, he is liable.*” (Italics supplied)

Judge Cardozo did *not* say—indeed no New York case passing directly upon the question of liability of public officers charged with the care and custody of public funds has ever said, either before or after 1916—that

If he (the Supervisor or other public officer) puts the public funds in a bank, and the bank loses it, he is liable unless the bank was one of the depositories which some one else had designated, under statutory authorization, as those which he might use.

On the contrary, the New York rule has been and is that the Supervisor or other public officer is not relieved from his liability by indirection or implication, but is liable for the loss of public funds so deposited, *unless and until his liability is expressly modified or limited by the Legislature*. In several of the decided cases, as recently as 1938 and 1939, the public officer charged with the “care and custody” of public funds was held liable for their loss, even though

they were actually placed in the possession of some one whom he did not appoint or select for that purpose.

The New York rule of absolute liability unless expressly exempted or modified by statute, was stated and implemented in Section 11 of the Public Officers Law, as it read and provided during 1931 through 1933 and applied to the surety bonds here sued on:

"§11. *Official undertakings.* Every official undertaking, when required by or in pursuance of law to be hereafter executed or filed by any officer, shall be to the effect that he will faithfully discharge the duties of his office and promptly account for and pay over all moneys or property received by him as such officer, in accordance with law, or in default thereof, that the parties executing such undertaking will pay all damages, costs and expenses resulting from such default not exceeding a sum, if any, specified in such undertaking. \* \* \*

In the present case, the Town Supervisor's undertaking was in almost the precise words of the statutes (R. 36-37); and in *Yawger v. American Surety Co., supra*, the New York Court of Appeals expressly sustained the liability of a surety company on a similar obligation for loss of town funds resulting from bank failure.

The decision of the Court below, holding that the Town Board's designation of The Pelham National Bank as one of the three depositaries of Town funds had the effect of terminating or modifying Supervisor McCormick's absolute and continuing liability for any loss of Town funds and relieving McCormick and the Surety Company of all liability and responsibility for the loss of Town funds resulting from the failure and insolvency of The Pelham National Bank is thus directly at variance with the above-cited New York authorities defining the scope of liability of public officers charged with the care and custody of public

funds. Although the Courts of some other states, under differing statutory patterns, have relaxed the absolute liability of public officers for funds kept in a particular depository designated by some other public officer or body, no authoritative New York case, so far as we can find, has ever done so, whether a particular depository be designated or whether, as here, the designation is of several from which the public officer may and does make his choice.

In the most recent case of *Bird v. McGoldrick* (1938), *supra*, wherein a Clerk of the Municipal Court was held absolutely liable for a loss of public funds through the defalcation of a subordinate who had been appointed by other authority, the New York Court of Appeals declared anew its adherence to the rule of strict liability without qualification. Although Judge Lehman, in his opinion, expressed some hesitancy as to extending the rule to include a loss caused by the failure of such a subordinate to *collect* public moneys, as distinguished from a loss of public moneys *received* by a public officer, and the liability was ultimately predicated upon the Clerk's statutory duty, Judge Lehman expressly stated "that the rule of strict liability for moneys *received* by a public official is in accord with the great weight of authority in this country" and that "this Court has reiterated the rule of a public officer's strict and almost absolute liability for public moneys received by virtue of his office", citing *Yawger v. American Surety Co.*, *supra*, *Village of Bath v. McBride*, *supra*, *City of New York v. Fox*, 232 N. Y. 167. Moreover, Judge Lehman stated unequivocally, as quoted on page 13, *ante*, the rule for Courts to follow, in resisting suggestions for exemptions or exceptions by judicial construction.

*Village of Bath v. McBride*, *supra*, referred to in the majority Opinion below (R. P. 56 ) decides nothing to the contrary. In that case, the New York Court of Appeals reversed the decision of the Appellate Division, Fourth

Department (163 App. Div. 714), and held the Village Treasurer liable for the loss of Village funds resulting from the failure of a local bank. Not only did the Court of Appeals find no evidence to support the Appellate Division's finding that the Village Trustees had designated the bank as a depository of Village funds, but the Court of Appeals went further and said (219 N. Y. at page 97):

"It seems to have been a case in which the bank itself discharged the duties of village treasurer, and one of its tellers or employees was perhaps put forward to hold the office. The course of business in the bank with reference to the village moneys shows that the defendant McBride held his office more or less as a formality, but though that be so, *the Court cannot exempt him from the responsibility which he thus assumed. The rule of strict liability laid down in Tillinghast v. Merrill (supra) is a very important one, and it should not be frittered away in seeking to give relief in hard cases.*" (Italics supplied)

Manifestly, the *dicta* in *City of Newburgh v. Dickey*, 164 App. Div. 791, and *People ex rel. Glens Falls Trust Co. v. Reoux*, 60 Misc. 139 (aff'd without opinion 128 App. Div. 933), decided by lower Courts, furnish no competent authority for the decision below in this case. Neither of those cases in lower Courts involved the question here at issue. In the *City of Newburgh* case, the question was whether the City Charter empowered the City Council, instead of the City Treasurer, to designate the depository of City funds; and the Court held that it did. In the *Reoux* case, the question was whether the County Law empowered the County Board of Supervisors, instead of the County Treasurer, to designate the depository of County funds; and the Court held that it did not. In both cases, the observations made by the lower Courts concerning the scope of liability of the respondent public officials were mere make-weight arguments; and the Courts' reasoning in each instance was

wholly out of line with the rationale of the New York Court of Appeals' decisions hereinabove cited and discussed.

In this connection, it may also be noted that the portion of the opinion of the Appellate Division, Second Department, in the *City of Newburgh* case, which is quoted in the majority Opinion below (R. P. 57 ), was based on an inclusive footnote contained in *Dillon on Municipal Corporations* (5th Ed. 1911), § 434, which in turn was based upon a *dictum* contained in the early Michigan case of *Perley v. Muskegon County*, 32 Mich. 132. Apart from the fact that the *Perley* case did not involve the question of the liability of a public officer for public funds lost through bank failure, it was expressly recognized by the Michigan Court (32 Mich. at page 135) that

“The position of a public officer is peculiar, and the differences in different systems of statutes show that the responsibility is not by any means uniform  
\* \* \*.”

Having regard for the legislative plan and the statutory method of protection which was available to the Town Supervisor under the Town Law in the instant case, and in view of the New York Court of Appeals' unvarying refusal to create exceptions to the rule of the outright liability of public officials for loss of public funds, and its express admonition that such a change or limitation would be the function of the Legislature, and not of the Courts, we respectfully submit that the decision of the Court below was clearly erroneous and in direct and prejudicial conflict with the applicable State decisions and statutory public policy.

**The decision of the Circuit Court of Appeals nullifies the express Legislative policy of the New York Town Law designed to assure the safety of Town funds in any and all events**

The table of statutes set forth in the Appendix shows conclusively that the fundamental purpose of the New York Legislature, at all times, has been to provide for the complete safety of Town funds in any and all events.

Under the *old* Town Law (L. 1909, Ch. 63, §§ 100, 101), in force when Supervisor McCormick took office, the Town Supervisor and the sureties on his official undertaking were absolutely liable to the Town, for any loss of Town funds, *even* a loss resulting from bank failure; but the Supervisor, in recognition of this latter liability, was authorized to "purchase a surety bond of some solvent surety company, \* \* \*, *securing to such Supervisor the safety of Town funds deposited by him in any bank or banking institution in this State, and indemnifying him against the loss thereof*".

Under the *new* Town Law as originally enacted (L. 1932, Ch. 634, §§ 25, 29), effective January 1, 1934, the Town Supervisor and the sureties on his official undertaking were absolutely liable to the Town for any loss of Town funds, except a loss resulting from bank failure; but the Supervisor was required to "purchase at the expense of the Town a surety bond \* \* \*, *securing to the Town the safety of Town funds deposited by him in or with any bank or trust company in this State, and indemnifying the Town against the loss thereof*". After the *new* Town Law became effective on January 1, 1934, the provision of Section 29(6) of the new Town Law requiring the Town Supervisor to purchase a depository bond in favor of the Town was repealed (L. 1934, Ch. 675), in view of the express provision of Sec-

tion 25 of the new Town Law authorizing the Town Board to "require *any Town officer* depositing funds or moneys of the Town to file a *depository bond indemnifying the Town against any loss thereof*".

From this comparison of the reciprocal provisions of the old Town Law and the new Town Law, it will be seen clearly that the decision of the Court below not only disregards the well-recognized rule of statutory construction that "a material change in the phraseology of an act is generally regarded as a legislative construction that the law so amended did not originally embrace the amended provisions" (*Pyrke v. Standard Accident Insurance Co.*, 144 Misc. 53, 57; *aff'd sub nom., Baldwin v. Standard Accident Insurance Co.*, 237 App. Div. 334, *aff'd* 262 N. Y. 575), but does violence to the whole Legislative intent and framework of the New York Town Law in force up to and during the time Supervisor McCormick was in office and the loss of funds took place, and completely nullifies the express legislative policy in New York designed to assure the safety of Town funds and monies in any and all events.

### III

**The decision of the Circuit Court of Appeals destroys vested contract rights and impairs the obligation of the contract represented by the bond sued on**

It is manifest that the majority Opinion below, in denying the Town's right to recovery over against the Surety Company on its third-party complaint, gave essentially a *retroactive effect* to the later amendments of the New York Town Law, and thereby destroyed the vested rights of the Town against the Surety Company on Supervisor McCormick's official undertaking conditioned to "pay over and account for all funds coming into his hands \* \* \* by virtue of his said office of Supervisor" (R. 36-37).

In executing Supervisor McCormick's official undertaking as surety, the Surety Company knew and was fully aware of the Town Supervisor's absolute liability for the loss of Town funds, including a loss of Town funds resulting from bank failure. That is why the condition of its bond was not qualified, as in the case of *City of Scranton v. Aetna Casualty and Surety Co.*, 11 F. Supp. 986, aff'd 94 F. (2d) 941, cited in the opinion of the District Court below (R. 141); that is why the Surety Company asked Supervisor McCormick to enter into the Escrow Agreement with The Pelham National Bank (R. 73); and that is why the Surety Company should now be held liable to the Town for the present loss pursuant to the express terms of its surety contract.

The obligations of Supervisor McCormick and the Surety Company, as surety on his official undertaking, are properly to be determined "by the special contract evidenced by his bond conditioned as above stated" (*Smythe v. United States*, 188 U. S. 156); and, as stated by Judge Cardozo in *Yawger v. American Surety Co.*, *supra*, a public officer charged with the care and custody of public funds does not "pay over and account" for such funds by pointing to a "fictitious balance" in an insolvent bank (212 N. Y. at page 298).

### In Conclusion

In conclusion, therefore, it is respectfully submitted that the petition of the Town of Pelham for a writ of certiorari herein should, in all respects, be granted.

WILLIAM L. RANSOM  
Counsel for Petitioner

# TABLE OF NEW YORK STATUTES SHOWING LEGISLATIVE ACTION AS TO THE LIABILITY OF A TOWN SUPERVISOR AND ASSURING THE PROTECTION OF THE FUNDS OF THE TOWN

Years 1916-1933

## PUBLIC OFFICERS LAW

"§ 11. *Official undertakings. Every official undertaking, when required by or in pursuance of law to be hereafter executed or filed by any officer, shall be to the effect that he will faithfully discharge the duties of his office and promptly account for and pay over all moneys or property received by him as such officer, in accordance with law, or in default thereof, that the parties executing such undertaking will pay all damages, costs and expenses resulting from such default, not exceeding a sum, if any, specified in such undertaking. \* \* \**" (L. 1909, Chap. 51, as amended).

## OLD TOWN LAW

Years 1934-36

Public Officers Law, Section 11, continued in effect unchanged.

## NEW TOWN LAW

Effective January 1, 1934, but enacted by L. 1932, Chap. 634, the legislative plan and the provisions contained up to that time in Sections 100, 101, and 149-c of the Town Law were amended generally; and the Supervisor was for the first time expressly relieved from liability for moneys deposited in designated banks if he followed the required procedure for protecting the Town against loss. The new provisions were in New Town Law, Sections 25 and 29, *not effective until January 1, 1934:*

Year 1937

Public Officers Law, Section 11, continued in effect unchanged.

New Town Law, Sections 25 and 29, with amendments shown in the previous column, remained in force. But in 1937, an additional sentence was added (L. 1937, Chap. 468) to Section 64(1) of the New Town Law, providing that

"All acts done prior to the effective date of this Section which would have been valid hereunder are hereby validated."

Year 1937

## Years 1934-36

"§ 25. *Oaths of office and undertakings.* \* \* \* *Each Supervisor, town councilman, town clerk, collector, receiver of taxes and assessments, justice of the peace, constable, town superintendent of highways, and such other officers and employees as the Town Board may require, before entering upon the duties of his office, shall execute and file in the office of the clerk of the county in which the Town is located, an official undertaking, conditioned for the faithful performance of his duties, in such form, in such sum and with such sureties as the Town Board shall direct and approve. The undertaking of the Supervisor shall be further conditioned that he will well and truly keep, pay over and account for all moneys and property, including the local school fund, if any, belonging to his Town and coming into his hands as such Supervisor. The Town Board at any time may require any such officer or employee to file a new official undertaking for such sum and with such sureties as the board shall approve. In addition the Town Board may require any Town officer depositing funds or moneys of the Town to file a depository bond indemnifying the Town against any loss thereof.*"

## Years 1916-1933

"§ 100. *Supervisor's undertaking.*—Every Supervisor hereafter elected or appointed shall, within thirty days after entering upon his office, make and deliver to the town clerk of the Town his undertaking, with such sureties as the Town Board shall prescribe, to the effect that he will well and faithfully discharge his official duties as such Supervisor, and that he will well and truly keep, pay over and account for all moneys and property, including the local school fund, if any, belonging to his Town and coming into his hands as such Supervisor; \* \* \*"  
(L. 1909, Chap. 63).

"§ 149-c. *Duties of Supervisor.* The Supervisor of any such Town shall demand, collect, receive and have the care and custody of and shall disburse all moneys belonging to or due the Town from every source, except as otherwise provided by law. *All moneys of the Town received by the Supervisor shall be deposited by him in such bank, banks or trust companies as shall be designated by the Town Board for such purpose.* \*\*\*" (L. 1916, Chap. 396, Article VI-A, Town Law, providing a budget and fiscal system for certain classes of Towns; applicable to Towns in Westchester County March 12, 1931, pursuant to L. 1931, Chap. 92).

NOTE: When the budget plan for Towns was enacted in 1916, including Section 149-c, the "saving clause" (Section 149-e) disclaimed intent to repeal or modify any existing provisions of the Town Law not inconsistent with the budget plan. When Article VI-A was amended in 1931 so as to make the budget plan applicable to Towns in Westchester County, both the title of the Act and the "saving clause" (L. 1931, Chap. 92, Section 149-f) again disclaimed and precluded any other intent.

"§ 29. *Powers and duties of Supervisor.* The Supervisor of each Town

1. Shall act as treasurer thereof and shall demand, collect, receive and have the care and custody of moneys belonging to or due the Town from every source, except as otherwise provided by law.

2. Within ten days after their receipt, shall deposit in his name as Supervisor, all such moneys in or with such banks or trust companies of this State, as the Town Board may designate, and agree with such banks and trust companies upon the rate of interest to be paid upon deposits, which interest shall accrue to the fund or account earning the same.

*Such designation and deposit of the moneys shall not release the Supervisor nor his sureties from any liability in relation to such moneys, nor in any manner affect such liability except, however, that the default by any such depository shall not be deemed the default of the Supervisor and his sureties shall not be liable to the Town for any loss due to the default of such depository.* \*\*\*

Year 1937

## Years 1934-36

"§ 101. *Surety bond indemnifying Supervisor against loss of deposits.*—The Supervisor of any Town may purchase a surety bond of some solvent surety company, authorized to do business in the State of New York, securing to such Supervisor the safety of Town funds deposited by him in any bank or banking institution in this State, and indemnifying him against the loss thereof through the failure or insolvency of such bank or banking institution, and the cost of such bond shall be a Town charge and shall be audited and paid in the same manner as other Town charges" (L. 1909, Chap. 63).

6. *Shall purchase at the expense of the Town a surety bond of a surety company, authorized to do business in the State of New York, securing to the Town the safety of Town funds deposited by him in or with any bank or trust company in this State, and indemnifying the Town against the loss thereof, or, whenever authorized and directed by the Town Board, said Supervisor may accept from any bank or trust company in this State in which Town funds are on deposit, the bonds or certificates of the United States, of the State of New York or of any County, Town, City, Village or School District of the State of New York as security for the funds of the Town so deposited but such bonds or certificates shall be subject to the approval of the Town Board and shall be deposited in such place and held under such conditions as the Town Board may determine."*

*Note: Before their taking effect on January 1, 1934, Section 25 of the New Town Law was amended (L. 1933, Chap. 751) in a respect not material here, and Section 29, sub-division 2, of the New Town Law was amended so as expressly to relieve the Supervisor of liability for the loss of deposited funds through default of a bank, etc., in the absence of*

Years 1916-1933

Years 1934-36

Year 1937

gross negligence or fraud" on the part of the Supervisor (L. 1933, Chap. 751). The protection of the Town pursuant to Section 29, sub-division 6, was expressly retained.

After the taking effect of the New Town Law and the new legislative law plan on January 1, 1934, Section 29, sub-division 2, was further amended and Section 29, sub-division 6, was repealed, in view of the provision of Section 25 authorizing the Town Board to require a Supervisor to furnish also a depository bond to protect the Town against loss of deposited funds (L. 1934, Chap. 675). After requiring the deposit of Town funds in banks to be designated by the Town Board, the amendment provided in express terms (Section 29(2)) that

"Such designation and deposit of the moneys shall release the Supervisor and his sureties from any liability for loss of such moneys by reason of the default or insolvency of any such depository."

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1943

No. 792

EDWARD D. LOUGHMAN, as Receiver of The Pelham  
National Bank, Pelham, New York,

*Plaintiff,*

*against*

TOWN OF PELHAM, Westchester County, New York,  
*Petitioner and Third-Party Plaintiff,*

*against*

THE EMPLOYERS' LIABILITY ASSURANCE  
CORPORATION, LTD.,

*Respondent and Third-Party Defendant.*

**BRIEF IN BEHALF OF RESPONDENT AND  
THIRD-PARTY DEFENDANT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

EDWARD S. BENTLEY,  
*Counsel for Respondent and  
Third-Party Defendant.*

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Third-Party Defendant,*  
No. 20 Exchange Place,  
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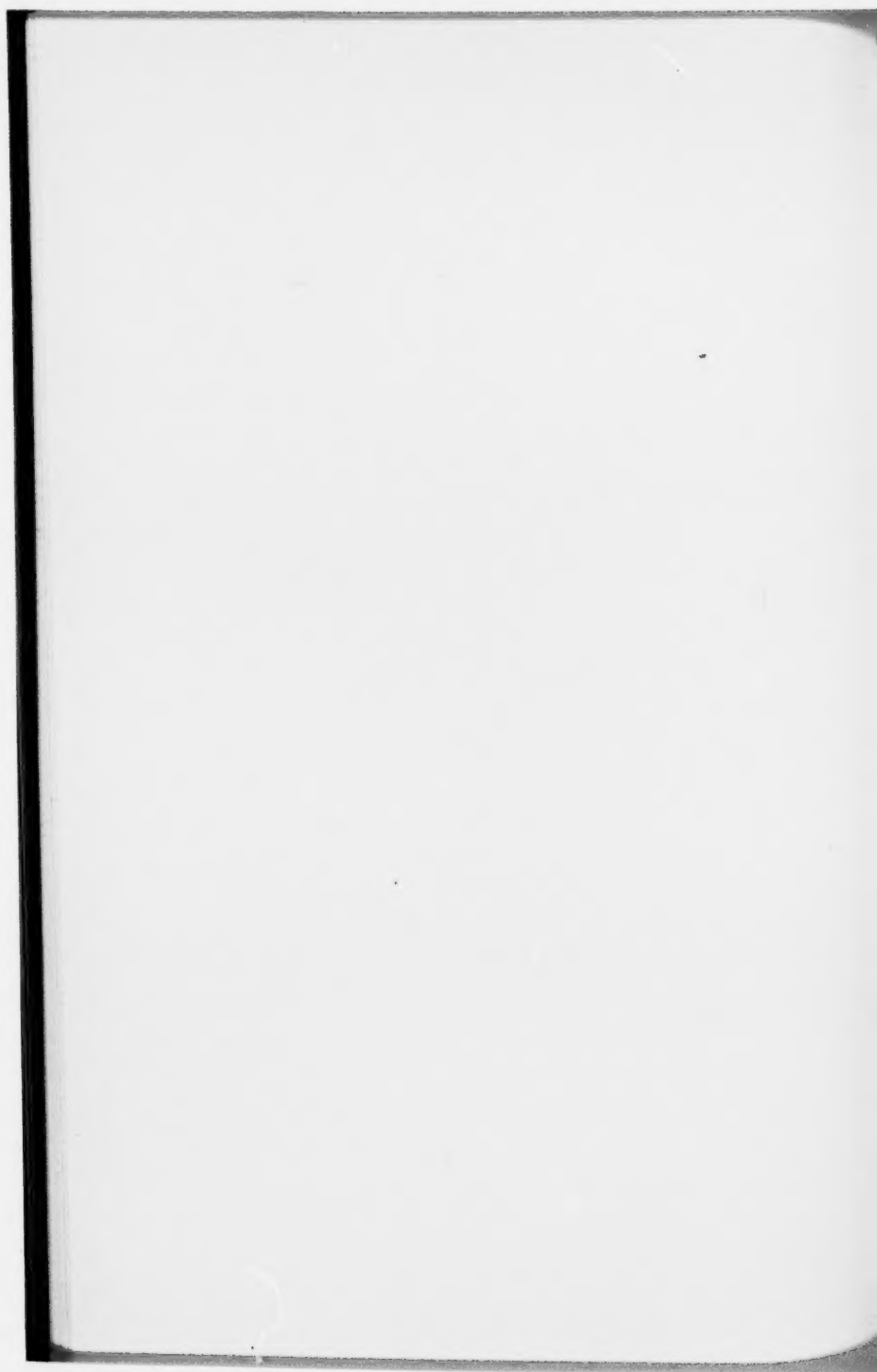
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**BRIEF IN BEHALF OF RESPONDENT AND  
THIRD-PARTY DEFENDANT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

**POINT ONE**

The Circuit Court of Appeals correctly followed and applied the law of the State of New York as established by applicable decisions of the New York courts, and as subsequently embodied in New York legislation.

No claim of negligence, misfeasance, or nonfeasance has ever been asserted against either Supervisor Mc-

Cormick or his successor Supervisor McBride. The District Court so held (fol. 130). The Circuit Court of Appeals did not dispute the finding. Upon that basis the argument proceeded in both the courts below, and must continue here.

No statute or regulation imposed a personal liability upon Supervisor McCormick for the loss of town funds through the failure of a bank designated by the town board pursuant to statute as a depository of town funds, where the supervisor himself was concededly free from fault.

The so-called "rule of strict liability" upon which the petitioner relies, finds its basis in judicial legislation contained in decisions such as *Tillinghast v. Merrill*, 151 N. Y. 135 and *Yawger v. American Surety Co.*, 212 N. Y. 292.

In the absence of a statute book in which the words of the rule appear, from which the extent of the supervisor's liability might be determined by familiar principles of statutory construction, the scope of the rule must be considered as expounded by the court decisions in which alone it is to be found.

A study of these decisions shows clearly that the rule of strict liability does not extend to a loss caused by the insolvency of a depository, where the supervisor had no power to designate the depository, and did not in fact designate such depository.

*Tillinghast v. Merrill*, *supra*, *Yawger v. American Surety Co.*, *supra*, and *Village of Bath v. McBride*, 219 N. Y. 92, relied upon by the petitioner, dealt with situations where the statute gave the fiscal officer the exclusive right to designate a depository, and the depository whose insolvency caused the loss was actually selected by the fiscal officer held liable. In none of those cases was the defaulting depository designated pursuant to statute by

the municipal governing board, as was the case in the suit at bar.

In *Tillinghast v. Merrill*, Supervisor Merrill, of the town of Stockbridge, deposited public moneys with a firm of private bankers to his credit as supervisor. The banking firm failed and the money was totally lost. The trial judge found that Merrill acted in good faith and without negligence in all that he did. The action was brought by the county treasurer to recover the money from Merrill and his bondsman upon the theory that Merrill, upon receiving the money, became the debtor of the county, and that the deposit of the money was at his own risk. It was held that Merrill and his surety were liable.

At the time of the *Tillinghast* case, the statute, differing from the Town Law of the State of New York as it existed in 1931, 1932 and 1933, when the deposits were made, contained no provision for the designation of the depository by the town board. There was no statute which authorized or permitted the town board of the town of Stockbridge to designate the depository of public funds, or which directed or controlled Merrill in his method of safeguarding the moneys committed to his charge. However spotless Merrill's personal integrity, it was the undeniable fact that the loss occurred through his mistaken choice of a depository.

The inapplicability of the holding and reasoning of the *Tillinghast* case to the facts in the case at bar, can best be shown by quotation from the opinion of the Court of Appeals at page 142 as follows:

"As before intimated, we must consider and decide this question upon general principles and in the light of public policy.

In the case of an officer disbursing the public moneys much may be said in favor of limiting his liability where he acts in good faith and without negligence, and a strong argument can be framed against the great injustice of compelling him to respond for money stolen or lost while he is in the exercise of the highest degree of care and engaged in the conscientious discharge of duty. When considering this side of the case it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law which exacted proof of misconduct or neglect.

It is at this point, however, that the question of public policy presents, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents.

Without regard to decisions outside of our own jurisdiction, we think the weight of the argument, treating this as an original question, is in favor of the rule of strict liability which requires a public official to assume all risks of loss and imposes upon him the duty to account as a debtor for the funds in his custody.

We do not wish to be understood as establishing a rule of absolute liability in any event. The United States Supreme Court, in *United States v. Thomas* (15 Wallace, 337), held the surveyor of customs for the port of Nashville, Tennessee, and depository of public money at that place, not liable when prevented from responding by the act of God or the public enemy.

If that state of facts is hereafter presented to this court it will doubtless be carefully considered

whether it does not present a proper exception to the general rule."

Prevention of fraud was the basis for the rule in *Tillinghast v. Merrill*. As was pointed out in the language quoted, to relieve the custodian of public funds from the strictest liability, would open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of public funds constantly passing through the hands of disbursing agents.

In our situation, however, no possible public policy or useful purpose could be served by holding the supervisor liable. Supervisor McCormick did not select the depositary which lost the funds, and had no right or power to do so. The town board designated the depositary, as the statute directed it should. If McCormick had deposited the moneys elsewhere, he would have been committing a violation of the law,—though the result might have been to preserve the funds. In no sense whatsoever was he the custodian of the funds while in the possession of the depositary named by the town board. The responsibility in this respect was placed on the town board, which had the statutory duty of designating the depositary, and which in fact performed this duty.

While Supervisor McCormick was a member of the town board and was able to cast one vote, there were five other members, each of whom was also entitled to cast a vote. If some statute had provided, public policy might perhaps have been served by imposing on all of the members of the town board an absolute joint and several liability in case of the insolvency of the depositary. No possible purpose could be served by holding only one

member of the town board to such liability, while letting the other members go scot free, thereby making the supervisor a "whipping boy" for the entire group.

The second case of the series relied upon by the petitioner is *Yawger v. American Surety Co., supra*, which involved the supervisor of the town of Cicero, Illinois. The facts were similar to those in *Tillinghast v. Merrill*, and the result was the same. In its essence, however, it adjudicates the law of the state of Illinois and not the law of the state of New York.

The third case relied upon by the petitioner is *Village of Bath v. McBride, supra*. This is an interesting case, and we ask the Court to read carefully, not only the opinion of the Court of Appeals, but also the opinion of the Appellate Division reported in 163 App. Div. 714.

The action was brought by the village of Bath to recover upon the official bond of McBride, the village treasurer, for moneys lost through the failure and bankruptcy of the George W. Hallock Bank. The trial court found that McBride had "custody and possession" of the funds. Judgment was rendered in favor of the village for the amount of village moneys lost, with interest. The judgment was reversed by the Appellate Division, and the finding of the trial court as to the custody and possession of the funds by McBride was disapproved, and an affirmative finding was made that the trustees of the village of Bath had, by resolution, designated the George W. Hallock Bank as depositary of the village funds. The Appellate Division held that such designation took the case out of the rule of strict liability laid down in *Tillinghast v. Merrill*. The Appellate Division said at page 717:

"Liability herein has been predicated upon a line of authorities illustrated by *Tillinghast v. Mer-*

*rill* (151 N. Y. 135). It was there held that the supervisor of a town was, by virtue of his office, the insurer of the moneys in his hands. But an examination of that and similar authorities discloses that such strict rule of liability has its foundation in the fact that such officer is made by statute the depository of the public moneys. In the *Tillinghast Case* (*supra*) the distinction in the rule of liability, where the depository is fixed by statute, is pointed out in the reference therein to *United States v. Thomas* (15 Wall. 337). It would not apparently admit of question but that had the village board of Bath designated this Hallock Bank, prior to its failure, no liability would or could exist against appellants, and such would seem to be the just and equitable rule of liability to be applied."

The Court of Appeals indicated no disagreement with the rule of law so stated. The sole ground given by the Court of Appeals for reversing the Appellate Division and sustaining the judgment of the trial term in favor of the village, was that the board of trustees had not made the designation claimed, and that its resolution accepting the bank's offer to pay interest in case village funds were deposited there, was not a substantial equivalent. The Court of Appeals said:

"I think there was no evidence to support the finding of the Appellate Division and that we must reverse the judgment appealed from" (p. 96).

"Assuming that the board of trustees had power to designate a depository of village money and power to require the treasurer to deposit the money according to such designation, they did not exercise that power" (p. 97).

"My conclusion is that the judgment appealed from should be reversed and the judgment of the trial court reinstated, with costs. This conclusion renders it unnecessary to consider the other questions raised by the appellant" (p. 97).

In the recent case of *Matter of Bird v. McGoldrick*, 277 N. Y. 492, also relied upon by the petitioner, the Court of Appeals was asked to apply the rule of *Tillinghast v. Merrill* to the clerk of the municipal court of the city of New York, borough of Manhattan, third district, for moneys misappropriated by one of his deputies. The Court of Appeals refused to do so, holding that the liability of the clerk rested in the clear mandate of the statute which made him \* \* \*

"\* \* \* responsible for, the general conduct of business of his office and for the faithful discharge of the duties of the deputy and assistant clerks and other officers connected with the court" (p. 500).

Commenting upon the *Tillinghast* case, Chief Judge Lehman said at page 498:

"From the time when the courts were first called upon to determine the measure of liability of a public official for moneys in his custody, judges have recognized that choice of any rule must depend upon the weight to be given conflicting considerations of public policy. The dissent of Sir JOHN HOLT from the early decision in *Lane v. Cotton and Frankland* (*supra*), that a postmaster is not responsible for money stolen or lost without his fault, was based upon the ground that a sound public policy dictated the rule of strict liability in order to prevent frauds. The choice made by this court of the rule of strict liability in *Tillinghast v. Merrill*,

*supra*, was in large degree based upon similar views of public policy."

The Court continued at page 499:

"There can be no doubt that the rule of a strict liability for moneys *received* by a public official is in accord with the great weight of authority in this country. Indeed, the decisions, both Federal and State, are almost uniform. Many are cited in the opinion in *Tillinghast v. Merrill* (*supra*), and it would serve no useful purpose to add later citations which also support the rule. Even so, a careful analysis of recent decisions seems to indicate a growing sense of the injustice of imposing liability upon a public official without exacting proof of misconduct or negligence on his part, especially where loss is due solely to the dereliction of a subordinate who is not chosen by the official held liable. Though this court has reiterated the rule of a public officer's strict and almost absolute liability for public moneys received by virtue of his office (*Yawger v. American Surety Co.*, 212 N. Y. 292; *Trustees of Village of Bath v. McBride*, 219 N. Y. 92; *City of New York v. Fox*, 232 N. Y. 167), yet it may be noticed that only in the last cited case did it appear that the loss was due to the dereliction of a subordinate and there the court pointed out that the subordinate was chosen by the official held liable."

Indeed, Chief Judge Lehman indicated that, except for the express language of the statute, the decision might well have gone otherwise, saying at page 499:

"It is for the Legislature, not the courts, to change or limit the rule if such change seems wise. Even so, this court might hesitate to extend a rule (formulated by this court on grounds of public policy) which imposes upon public officers strict

liability for loss of public moneys *received*, so that such liability would include also loss caused to the public by failure of a subordinate to *collect* public moneys."

To similar effect is *City of New York v. Fox*, 232 N. Y. 167, where the warden of the workhouse on Blackwell's Island was held liable for money embezzled by one of his subordinates, not because of the rule in *Tillinghast v. Merrill*—for the Court of Appeals expressly refused to apply it,—but on the familiar basis of *respondeat superior*.

As opposed to those decisions, in every case in which a New York court has been called upon to consider the precise point involved in the case at bar, the court has held, or at least indicated, that the rule of *Tillinghast v. Merrill* did not apply.

*City of Newburgh v. Dickey*, 164 App. Div. 791;  
*People ex rel. Glens Falls Trust Co. v. Reoux*,  
 60 Misc. 139, aff'd 128 App. Div. 933;  
*Village of Bath v. McBride*, *supra*.

*City of Newburgh v. Dickey*, *supra*, was a submission of a controversy to the Appellate Division, Second Department, upon an agreed statement of facts. The city charter of the city of Newburgh contained no specific provision empowering either the city council or the city treasurer, or any other board or official, to select a depository. It was implied from general provisions, and the case proceeded on the assumption, that such power was vested in the city council. The city council passed a resolution designating a certain bank as the depository of the funds of the city and of the several departments thereof, and directing the city treasurer to deposit the funds of the city in that bank. The city treasurer refused to

comply with the direction, taking the position that he was the usual or legal custodian of the funds of the city by virtue of his office, and that he had the right to determine where he should deposit the money. He laid stress upon the fact that he was required by the charter to give a bond to faithfully discharge the duties of his office and to pay over all moneys received by him, and the city treasurer argued that, since he was required to give a bond and was thus responsible as insurer of the deposits, the fair intendment was that he should select the depository.

The Appellate Division sustained the position of the city council, and granted the mandamus requiring the city treasurer to deposit the funds in the depository designated by the city council.

After referring to *Tillinghast v. Merrill*, the Appellate Division rejected the treasurer's contention that he was an insurer of deposits under the circumstances presented, saying at page 794:

"But in that case the court said that they do not wish to be understood as establishing a rule of absolute liability in any event. Neither the requirement of this bond nor the general rule would extend to moneys received by the official while those moneys were held by a depository designated by another body or officer of the city in accord with law and exclusive of any power cast upon him. (Dillon Mun. Corp. (5th Ed.) 764, citing *Perley v. Muskegon County*, 32 Mich. 132. See, too, Mech. Pub. Off. 610; *Hobbs v. United States*, 17 U. S. Ct. Cl. 189). The condition of the bond would be met if he discharged his duty with respect to the moneys when not in the exclusive charge of the depository named by the city council."

*People ex rel. Glens Falls Trust Co. v. Reoux, supra*, was a mandamus proceeding to compel the county treasurer of Warren County to deposit county funds in a trust company designated by the county board of supervisors. It appeared that the county treasurer had previously designated a firm of private bankers as depository, and had deposited all of the public funds with them. The application was denied. Mr. Justice Spencer said at page 142:

“By section 145 of the County Law, the county treasurer is not released from liability to the county for moneys deposited, but the default of the depository is deemed the default of the treasurer. If the contention prevail that the treasurer submit to the directions of the board of supervisors in the selection of a depository, then the treasurer is responsible for the default of one he did not select. It cannot be supposed that the law contemplated any such result.”

The same views were expressed by the Appellate Division in *Village of Bath v. McBride, supra*. Although the judgment was reversed by the Court of Appeals on a factual point, it seems to us significant that the Court of Appeals allowed the rule laid down by the Appellate Division to pass unchallenged. For if the judges of the Court of Appeals had believed that the Appellate Division had announced an incorrect and unsound principle of law, it is certain that they would not have allowed the holding to stand unquestioned but would, at the very least, have indicated disagreement with it.

We have found no authority in the state of New York contrary to the views expressed in the three cases last cited. Counsel for the petitioner has also referred to

none, and Circuit Judge Swan, in his dissenting opinion, referred to none.

In other jurisdictions, whenever the precise question arose, the fiscal officer has uniformly been held not liable where someone else was required to, and did, designate the depositary, the only exceptions being where he knew at the time the deposits were made that the bank was unsafe, or ignored a condition expressly attached to the designation, or was negligent in other particulars,—exceptions which were absent in the case at bar.

- Perley v. Muskegon County*, 32 Mich. 132;  
*City of Scranton v. Aetna Casualty and Surety Co.*, 11 Fed. Supp. 986, aff'd 94 Fed. 2nd 941;  
*Ex parte Morris*, 9 Wall. 605;  
*Miller v. Batson*, 160 Miss. 642;  
*Board of Education v. Nelson*, 33 N. Dak. 462;  
*Hinton v. State*, 57 Okla. 777;  
*State ex rel. Adair County v. McCloud*, 64 Okla. 126;  
*Grant County v. Soucek*, 128 Okla. 151;  
*Edgerton Independent Consolidated School District v. Volz*, 50 S. Dak. 107;  
*Board of Education v. Whisman*, 56 S. Dak. 472;  
*Edwards v. Logan County*, 244 Ky. 296;  
*Stephens v. Ludlow*, 159 Ky. 729;  
*Montgomery v. State*, 97 Miss. 292;  
*State v. Carney*, 208 Ia. 133;  
*Mordt v. Robinson*, 116 Fla. 544;  
*Overton County v. Copeland*, 96 Tenn. 296;  
*Hobbs v. United States*, 17 Ct. Cl. 189;  
*Chandler v. Britton*, 197 S. Car. 303;  
*City of Livingston v. Woods*, 20 Mont. 91;

*American Surety Co. v. City of Thomasville*, 73  
Fed. 2nd 584, cert. denied 294 U. S. 721;  
*People ex rel. Nelson v. Peoples' State Bank*,  
354 Ill. 519.

See also the following cases where the court in stating or imposing the general rule of strict liability, expressly noted as an exception the case where the fiscal officer was required to deposit funds in a depository selected by someone else.

*State v. Bobleter*, 83 Minn. 479;  
*City of Bessemer v. Re*, 282 Mich. 180;  
*Bragg City Special Road Dist. v. Johnson*, 323  
Mo. 990;  
*Village of Hampton v. Gausman*, 136 Neb. 550;  
*Knox County v. Cook*, 126 Neb. 477;  
*Bunker v. United States Fidelity & Guaranty Co.*  
(Utah), 72 Fed. 2nd 899.

Commenting on such a situation, the court, in *Perley v. Muskegon County*, *supra*, said:

"If an officer is required or authorized by law to make deposits in any particular place or with any particular person, he is usually, if not universally, protected from any further responsibility, so long as he leaves it there, and is not a guarantor of the safety of the deposit."

Again, in *Hobbs v. United States*, *supra*, Judge Schofield said at page 196:

"The only fault or negligence complained of is the fact that he deposited the money in a bank designated by the Secretary as a depository of

public money, when he might have deposited it in the Treasury. That in itself was not a fault. It was strictly according to law. The Act March 3, 1857 (11 Stat. R. 243) authorized and required him to deposit in the Treasury or some public depository. The law does not provide that this compulsory choice should be at his peril. If he made it in good faith, without knowledge or suspicion of the bank's insolvency, and without the expectation of gain or other private motive, he ought not to stand the loss."

To the same effect are the textbook writers:

*Dillon on Municipal Corporations* (5th Ed.) Sec. 434;

*Mechem on Public Officers*, page 610.

Judge Dillon, in a footnote appearing at page 764, says:

"If, however, the officer is required or authorized by law to deposit the money in a designated depository, he is usually protected from further responsibility and is not a guarantor of the safety of the deposit."

From the foregoing unbroken array of authority, it clearly appears that the decision of the Circuit Court of Appeals in the case at bar accorded with the overwhelming weight of authority on this point.

Subsequent New York legislation has approved the law laid down in *City of Newburgh v. Dickey*, and has limited the rule of *Tillinghast v. Merrill* to the facts there presented, and has expressly provided that the rule of absolute liability should not be extended to a case where

the depositary was required by statute to be selected by the town board.

Nearly a year before the Pelham National Bank closed on March 3, 1933, it had already been provided by Sections 29-(2) and 64-(1) of the New Town Law (Chapter 634 of the Laws of 1932), enacted April 8, 1932, that the designation of a bank or trust company by the town board as a depositary of town funds, and the deposit of the moneys in the depositary so designated, would relieve the supervisor and his surety in case of loss due to the default of the depositary so designated.

As pointed out by the Circuit Court of Appeals, this was, "obviously designed as a codification of previous piecemeal legislation, and was enacted with the intention of embodying in one comprehensive statute a legislative scheme pertaining to political subdivisions of the State, many of which had not been covered by much of the earlier scattered legislation" (R. p. 60).

To be sure these sections were contained in the New Town Law which did not become effective generally until January 1, 1934. But the announcement of the public policy as found in these two sections, 29 and 64, was nonetheless clear and effective from and after the time of the adoption of the legislation in 1932.

Furthermore, as if to remove any doubt about it, the legislature, by the 1937 amendment to Section 64-(1) (Chapter 468 Laws 1937) expressly gave these provisions retroactive effect saying:

"All acts done prior to the effective date of this section which would have been valid hereunder are hereby validated."

The petitioner argues that the enactment of these provisions of the New Town Law indicated a recognition on

the part of the legislature that the rule of absolute liability existed even where the depositary was selected by the town board, and showed a desire on the part of the legislature to change the rule.

We disagree with this contention entirely.

It will not be assumed that the legislature was insensate to the gross inequity pointed out in *City of Newburgh v. Dickey*, *People ex rel. Glens Falls Trust Co. v. Reoux*, and *Matter of Bird v. McGoldrick*, of holding a fiscal officer liable as insurer upon the default of a bank selected by a municipal body or officer over whom he had no control. It cannot be presumed that the legislature believed that the public policy of the State of New York demanded that a town supervisor be held liable under such conditions. The 1937 amendment showed conclusively that the legislature was impressed by such considerations and sought to relieve the supervisor as far as it had power to do so, even though it meant a loss to the town.

It seems clear to us that, in expressly providing that the supervisor should not be liable in case of loss of town funds due to the default of the depositary designated by the town board, the legislature evidenced its recognition that this was the existing public policy of the state, and announced its purpose that such public policy should be continued.

Even if it be true, as petitioner argues and as Judge Conger suggested, that the legislature had no constitutional power to give Sections 29 and 64 retroactive effect if the result would be to shift an existing loss from the supervisor to the town, (cf. *State ex rel. Jackson v. Middleton*, 215 Ind. 219, where such legislation was held constitutional), the legislation is not open to attack if it is

construed—as we think it should be construed—as a pronouncement that even before the enactment of the New Town Law the supervisor was no longer liable where the town board designated the depository. If there is force to petitioner's constitutional point, the 1937 amendment must be construed in such manner as to render it effective and valid.

It is respectfully submitted that the Circuit Court of Appeals correctly held that *Tillinghast v. Merrill* had no application here; that the case is governed by the rule of law laid down in *City of Newburgh v. Dickey* and by the Appellate Division in *Village of Bath v. McBride*; that the principles of public policy applicable to the present situation require that no liability be placed upon the town supervisor for discharging his duty by depositing funds in the depository selected by the town board pursuant to statute.

In effect, the Town of Pelham is seeking to reject the New York law as announced in *City of Newburgh v. Dickey*, and confirmed by subsequent legislation, and to extend the principle of *Tillinghast v. Merrill* to a field which has never been brought within the ambit of the decision, and which the New York legislature has expressly placed beyond its scope.

## POINT TWO

**The Circuit Court of Appeals followed and correctly applied the legislative policy of the New York Town Law defining the extent of the supervisor's duty and liability to the town.**

Both under Section 100 of the Old Town Law (Chapter 63 Laws of 1909) and under Section 25 of the New Town Law (Chapter 634 Laws of 1932) as well as at the present moment, the obligation of the supervisor is expressed in identical language, viz.:

“That he will well and truly keep, pay over and account for all moneys and property, including the local school fund, if any, belonging to his town and coming into his hands as such supervisor.”

Similarly during all of these years it was provided by Section 11 of the Public Officers Law, and is still provided by such statute that his official undertaking,

“shall be to the effect that he will faithfully discharge the duties of his office and promptly account for and pay over all moneys or property received by him as such officer, in accordance with law, or in default thereof, that the parties executing such undertaking will pay all damages, costs and expenses resulting from such default, not exceeding a sum, if any, specified in such undertaking.”

It is significant that when, in 1932, there was included in the New Town Law the following clause, appearing in Sections 29-(2) and 64-(1), viz.:

“Such designation and deposit of the moneys shall release the supervisor and his sureties from

any liability for loss of such moneys by reason of the default or insolvency of any such depositary,"

the language of Section 11 of the Public Officers Law, and of the above quoted clause in the Town Law, remained unchanged.

It was stipulated (fol. 24) that Supervisor McCormick complied implicitly with this direction and at no time deposited any funds in any depositary other than those designated by the town board.

Accordingly, when Supervisor McCormick was required to "account for and pay over" the lost funds, he completely fulfilled his obligation by showing that he had deposited the money in the Pelham National Bank, a depositary designated by the town board. No further accounting was required. He could only be held liable for the loss, upon proof of negligence or other misconduct on his part.

This was the holding of the Circuit Court of Appeals, Third Circuit, in *City of Scranton v. Aetna Casualty and Surety Co.*, 11 Fed. Supp. 986, aff'd 94 Fed. 2nd 941, where the city treasurer was required to "make daily deposits of all moneys received by him in such banks or institutions as may be designated by" the city council. His official bond was conditioned that he should "pay over to the persons authorized by law to receive the city's money that may come into his hands during said term as provided by law."

The Third Circuit held that the city treasurer was not liable. Circuit Judge Buffington said:

"As quoted above, the surety bond was to be released if the treasurer deposited the city money in city designated banks. This the treasurer did;

consequently, the obligation of the surety was complied with."

To the same effect is the decision of the Fifth Circuit in *Fanning County, Texas v. New York Casualty Co.*, 131 Fed. 2nd 664.

The petitioner also stresses the language of the supervisor's official bond, and points out that the bond was in substantially the same form as Supervisor Merrill's bond in *Tillinghast v. Merrill*, and argues that for this reason the surety should have been held liable in the case at bar.

The petitioner overlooks the fact that this was also substantially the same form of bond which was involved in *City of Newburgh v. Dickey*, as to which the Appellate Division said at page 794:

"Neither the requirement of this bond nor the general rule would extend to moneys received by the official while those moneys were held by a depositary designated by another body or officer of the city in accord with law and exclusive of any power cast upon him."

The petitioner also stresses Section 101 of the Old Town Law, carried over in Section 29-(6) of the New Town Law, which authorized (but did not direct) the supervisor to

"purchase a surety bond of some solvent surety company, authorized to do business in the state of New York, securing to such supervisor the safety of town funds deposited by him in any bank or banking institution in this state, and indemnifying him against the loss thereof through the failure or insolvency of such bank or banking institution."

As to this argument, the Circuit Court of Appeals gave the conclusive answer as follows (p. 59):

“Not only does this argument beg the question as to ‘inconsistency,’ but more important, it neglects the fact that there was good reason for retaining §101 after the enactment of §149-c, since the latter section did not apply to the Supervisors of many of the towns of the State. It is significant that when, subsequently, by the statute known as the New Town Law which became operative in 1934, Supervisors of all towns were relieved of liability for deposits in designated banks, §101 was expressly repealed.”

We respectfully submit, therefore, that the decision of the Circuit Court of Appeals was in complete accordance with the express provisions of the New York statutes and of the policy found therein.

### POINT THREE

**The decision of the Circuit Court of Appeals did not destroy or in any way affect vested contract rights, or impair the obligation of the contract represented by the bond sued upon.**

The petitioner's assertion that the Circuit Court of Appeals “gave essentially a retroactive effect to the later amendments of the New York Town Law” is refuted by the express language of both the District Court and the Circuit Court of Appeals.

Judge Conger rested his decision squarely on the language of Section 149-c of the Old Town Law added in 1916, which became applicable to the Town of Pelham

in March, 1931. After quoting this section, Judge Conger said (fol. 134):

"By this amendment, the supervisor no longer had any discretion as to where the Town's money was to be deposited. The depository was to be named by the Town Board. Can it be said that a supervisor who deposits money in a bank designated by the Town Board shall be held to the rule of strict accountability, if the bank fails and the Town loses money? I think not."

Referring to the retroactive amendment made by Chapter 468 of the Laws of 1937, Judge Conger said (fol. 146):

"As for the amendment of 1937, I am a bit at a loss as to just how far it may be applied. I doubt very much that the amendment of 1937 can be held to reach back and validate an illegal ultra vires agreement after the rights of all the parties concerned had become fixed and vested."

Therefore, far from relying upon retroactive legislation, Judge Conger expressly rejected the argument, and rested his decision on legislation adopted in 1916.

The Circuit Court of Appeals adopted the same line of reasoning.

It is respectfully submitted, therefore, that no contract rights were impaired or destroyed by the decision of the courts below, and that both decisions were carefully limited to a determination of the scope of the obligation imposed on the town supervisor when he took office on January 1, 1932, and under his official bond written in December, 1931.

## POINT FOUR

**This Court recently denied certiorari in a case involving closely similar facts.**

*American Surety Co. v. City of Thomasville*, 73 Fed. 2nd 584, cert. denied, 294 U. S. 721, was a decision of the Circuit Court of Appeals, Fifth Circuit, and involved the treasurer of the city of Thomasville, Georgia. Under the public act of legislature by which the city was created, the mayor and aldermen were empowered to elect a treasurer and other officials, and to "take their bonds, and prescribe their powers and duties." Pursuant to this authority, ordinances were passed providing for the treasurer's oath and bond "conditioned for the faithful discharge of his duty". Subsequent ordinances authorized the treasurer to divide deposits among the local banks, and designated three Thomasville banks as depositories of city funds. In succession, all three banks failed, resulting in a substantial loss of city money. The Court found that the city treasurer did not know, or have any reason to believe that either bank was insolvent or in a failing condition.

The District Court held the treasurer liable, but the Fifth Circuit reversed.

Judge Sibley, reading for the Circuit Court of Appeals said at page 586:

"In Georgia, as generally elsewhere, it is held that a public official intrusted with public moneys is bound to keep them safely at all events, and is not excused for losses unless perhaps when caused by the act of God or the public enemy. He is not a mere bailee answerable only for neglect. He

cannot ordinarily lend the funds to a bank on general deposit, but is liable if they are thus lost. This was held of a county treasurer in *Lamb v. Dart*, 108 Ga. 602; of the bond commission of a city in *Wiley v. City of Sparta*, 154 Ga. 1; and of a county school superintendent in respect of school funds in *American Surety Co. v. Ne Smith*, 49 Ga. App. 40."

After pointing out that in the *Wiley* case and the *Ne Smith* case the fiscal officers were permitted to select their own depositaries while the Thomasville city treasurer was compelled to comply with the designation made by the city council, the Court concluded:

"Under the agreed facts, the verdict directed was wrong. The loss ought to fall on the city whose council had full power over the treasurer and whose directions he was following, and not on him and his bond."

The parallel between that case and the case at bar is complete. In New York, as in Georgia, there exists the rule of strict liability, evidenced by decisions of the highest courts of the respective states. But there is an exception to that rule, illustrated in New York by *City of Newburgh v. Dickey*, and in Georgia by *American Surety Co. v. City of Thomasville*, where some one else is required by law to select the depository. In such case, the fiscal officer is not liable where he complies with the direction.

This Court denied certiorari in the *Thomasville* case, and should likewise deny certiorari here.

**POINT FIVE**

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

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